89-1912

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DONALD RAY BRICK,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

(1) Whether the fruits of a search of Petitioner Brick's residence should have been suppressed because his consent was infected by an illegal and unlawful arrest without intervening events to purge the primary taint?

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OPINIONS BELOW

The December 26, 1985, opinion of the Court of Appeals, Fourteenth Supreme Judicial District of Texas, sitting at Houston, Texas, affirming the trial court, was unpublished. It is reprinted in the Appendix at p. 1a, together with the October 21, 1987, published opinion of the Texas Court of Criminal Appeals, reversing and remanding, *Brick v. State,* 738 S.W.2d 676 (Tex. Cr. App. 1987) the August 31, 1989, unpublished opinion of the Fourteenth Court of Appeals on remand affirming the trial court, and the Texas Court of Criminal Appeals' refusal of the Appellant's and State's petitions for review and motions to rehear petitions for review.

JURISDICTION

The original opinion of the Texas court of appeals affirming the cause was issued on December 26, 1985. The Texas Court of Criminal Appeals reversed the court of appeals in a published opinion, *Brick v. State,* 738 S.W.2d 676 (Tex. Cr. App. 1987), on October 21, 1987. On August 31, 1989, the court of appeals again affirmed on remand in another unpublished opinion. Petitioner and the State both sought petitions for review with the Texas Court of Criminal Appeals. Both petitions were refused on February 7, 1990. Undeterred, Petitioner and the State sought motions for rehearing which were denied on March 14, 1990.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves U.S.C. Const. Amends. 4 & 14.

STATEMENT OF THE CASE

The facts of the case are straightforward. Officer W. L. Kendrick, a Houston Police Officer, was working in that capacity on May 7, 1984. (R. II. 34). His attention was riveted on a residence located at 9619 Orangevale, Houston, Texas. Kendrick stated "[he'd] received information from a credible and reliable and confidential informant that Petitioner and two other white males—the names were unknown to the informant—were possessing some cocaine at that residence." (R. II. 35). The informant described the exterior and interior of the house and the type of vehicle Petitioner would be driving. (R. II. 35, 36). After driving by the residence, Kendrick returned

to the central police station to type an affidavit and search warrant for the residence. (R. II. 37).

Officers Duke and Eslab stayed at the location to "do some surveillance work." (R. II. 37). Shortly, and while Kendrick was drawing the warrant, the informant called and stated that Petitioner was going to leave the residence and probably not return for a day or two. (R. II. 37). Officers Duke and Eslab contacted Kendrick by radio and informed him that the person they believed to be the Petitioner and a female were getting into a vehicle that the informant had described and were leaving the residence. (R. II. 38). Kendrick told them to "take him down," or arrest him, at that point. (R. II. 39). Petitioner was arrested at approximately 9:00 p.m. He was accompanied by a female companion. (R. II. 62). Petitioner and his passenger drove several blocks to a near by U-Totem and were arrested as they exited the store. (R. II. 64). Petitioner and his companion were carrying cokes as they left the store. (R. II. 67). At approximately 9:25, Petitioner signed a consent to search his residence. (R. II. 65).

The search of Petitioner's residence revealed seven to ten pounds of marihuana. (R. II. 47).

REASONS FOR GRANTING THE WRIT

The court of appeals conceded that Petitioner was arrested and handcuffed in a public place while in the company of a female companion, detained for some 25 minutes before having his handcuffs removed so that he could sign the consent to search form, given no *Miranda* warnings, consulted with no third party between his arrest and written consent, but claimed that his "written consent

to search was an intervening factor" and, anyway, no police flagrancy existed because sufficient probable cause to arrest Petitioner and search his residence was extant.

First, the Texas court of appeals repealed the Supremacy Clause and held that whether Petitioner received his *Miranda* warnings was not a determinative factor. This Court in *Brown v. Illinois,* 422 U.S. at 603 said "The *Miranda* warnings are an important factor, to be sure, in determining whether the [consent] is obtained by exploitation of an illegal arrest." Then, as if in a 19th century time warp, the court of appeals shifted the burden to Petitioner to prove that he received no *Miranda* warnings; again, this is contrary to this Court's teachings in *Brown,* supra, not to mention *Taylor v. Alabama,* 457 U.S. 687 (1982) and *Dunaway v. New York,* 442 U.S. 200 (1979). Accordingly, yet incongruently, the court of appeals said this factor weighed in Petitioner's favor.

Second, the Texas court of appeals stated that the time factor is ordinarily the "least determinative" of the *Brown* factors since what takes place in the interval between the arrest or stop and the search is a much more significant factor than whether the defendant consents immediately after the detention or five days later.

Justice Stevens, concurring, in *Dunaway,* at 220, stated:

> The temporal relationship between the arrest and the [consent] may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one. Conversely, even an immediate confession may have been motivated by a prearrest event such as a visit with a minister.

The court of appeals' statement may be correct if there are *intervening circumstances.* No intervening circumstances existed here. The court however claims "one significant intervening factor in [Petitioner's] case is his having executed a written consent to search." This reasoning is almost without precedent; however, see *United States v. Carson,* 793 F.2d 1141 (10th Cir. 1986). Consequently, if the court of appeals had decided *Brown, Dunaway* or *Taylor,* the confessions themselves in those cases would have been the intervening event dissipating the taint of the primary illegality to the extent that each would have been admissible at trial. Justices O'Connor, Rehnquist, Powell, and Chief Justice Burger, dissenting in *Taylor v. Alabama,* supra, at 700, described an intervening event; it is certainly not a confession or consent to search which are the products of the illegality.

Finally, as in *Brown, Dunaway* and *Taylor* no probable cause existed to arrest Petitioner or search his residence for possession of cocaine, contrary to the court of appeals' assertion. Officer Kendrick offered the only record testimony relative to probable cause, viz, "[he'd] received information from a credible and reliable and confidential informant that Petitioner and two other white males—the names were unknown to the informant—were possessing some cocaine at [Petitioner's] residence." (R. II. 35). Petitioner has been claiming for five years that this information fails miserably to establish probable cause to arrest him or search his residence under the "totality of circumstances" test in *Illinois v. Gates,* 462 U.S. 213 (1983), for the following reasons, namely, (1) Kendrick did not testify that the informant told him *he saw cocaine in Petitioner's possession or in his residence;* (2) assuming, without agreeing, that Kendrick's testimony relative

to probable cause evinces personal knowledge of the informant, the record is void as *to when the informant witnessed a violation of the law, cf. Sgro v. United States,* 287 U.S. 206 (1932), and *Schmidt v. Texas,* 659 S.W.2d 420 (Tex. Cr. App. 1983); and, (3) Kendrick never testified as *to when the informant told him Petitioner was possessing cocaine at his* [*Petitioner's*] *residence.*

Petitioner's Fourth and Fourteenth Amendment rights were violated when police seized and handcuffed him on the parking lot of a U-Totem store in Houston, Texas, without probable cause to arrest or search, gave no *Miranda* warnings, and no intervening event, meaningful or otherwise, occurred during the 25 minutes between the arrest of Petitioner and the removing of the handcuffs so that he could execute the consent to search form.

CONCLUSION

For the foregoing reasons, Petitioner Donald Ray Brick asks that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

Affirmed and Opinion filed December 26, 1985.

No. B14-84-871CR

DONALD RAY BRICK, Appellant

vs.

THE STATE OF TEXAS, Appellee

Appeal from the 262nd District Court
of Harris County
Trial Court No. 403,065

OPINION

Appellant was indicted for possession of marijuana in a usable quantity of more than five pounds and less than fifty pounds. Appellant entered a plea of guilty after the trial court overruled his motion to suppress. Punishment was assessed at ten years confinement in the Texas Department of Corrections which was probated, and a $5,000.00 fine. In three grounds of error, appellant complains that the trial court committed reversible error by allowing testimony, over timely objection, of the fruits of the search of his home; namely, the seizure of marijuana from appellant's bedroom. In his three related grounds of error, appellant complains that the seizure: (1) was the result of an unlawful arrest; (2) was the result of consent obtained through the exploitation of his arrest; and (3) was without probable cause as to the seizure of

his person or the search of his residence. We affirm the conviction.

On May 7, 1984, Houston narcotics officer W.L. Kendrick received a tip from a confidential informant whose information had proven reliable on prior occasions. The informant advised Officer Kendrick that appellant was in possession of narcotics at his residence and provided Kendrick with a description of appellant, his car, and also a description of both the exterior and interior of appellant's home including the location of the closet in which marijuana was later discovered. At approximately 7:00 p.m. on May 7, Officer Kendrick drove past appellant's residence in the company of fellow narcotics officers Eslab and Duke. The officers confirmed the description of appellant's car and residence. Officer Kendrick then returned to the narcotics division to type out a search warrant while the other two officers continued their surveillance of appellant's residence. While at the station typing the search warrant, Officer Kendrick received another call from the informant who advised him that appellant was preparing to leave the residence and not return for a day or two. Kendrick continued to type the warrant until he received a call from Officers Duke and Eslab who informed Kendrick that appellant and a female companion were getting into the vehicle described by the informant and were leaving the residence. At this time Kendrick told the officers to stop the vehicle and arrest appellant. Appellant was soon thereafter arrested as he exited a convenience store. Officers Eslab and Duke called Officer Kendrick at the station and advised him that appellant had agreed to sign a consent-to-search form, therefore Kendrick discontinued the preparation of the search warrant and proceeded to the scene of the arrest.

Upon arriving, appellant was provided a consent-to-search form which he read, stated that he understood its contents, and then signed and dated the form. The officers then drove with appellant to his residence and using his key entered and conducted their search. The officers found approximately ten pounds of marijuana and three and one-half grams of cocaine in appellant's bedroom. The police also discovered approximately $26,000 in a floor safe in appellant's bedroom which appellant opened himself. The informant had previously advised the police about the existence and location of this safe.

Appellant's three grounds of error on appeal all assert that the trial court erred in denying his motion to suppress. In his first ground of error, appellant complains that his motion to suppress should have been granted since the seizure of marijuana resulted from an illegal arrest. Appellant asserts that the Article 14.04 warrantless arrest exception does not apply because there was no proof that he was about to escape or that there was no time to procure a warrant. TEX. CODE CRIM. PROC. ANN. art. 14.04 (Vernon 1977). In his related second ground, appellant complains that since his arrest was illegal, the consent-to-search form which he signed was obtained through the exploitation of his unlawful arrest and cannot be used as a basis to uphold the search. Finally, appellant's third ground complains that his motion to suppress should have been sustained as both his arrest and the subsequent seizure were without probable cause.

It is not necessary for us to address the legality of appellant's arrest or the issue of the existence of probable cause for the law is clear that neither probable cause not a search warrant is necessary *if* consent to search is

given. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *Rumbaugh v. State,* 629 S.W.2d 747, 751 (Tex. Crim. App. 1982); *Jacobs v. State,* 681 S.W.2d 119, 122 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd). A search conducted pursuant to consent has long been a specifically established exception to the requirements of both a warrant and probable cause. *Nastu v. State,* 589 S.W.2d 434, 440 (Tex. Crim. App. 1979). The fact that a person is under arrest does not, in and of itself, prevent voluntary consent from being given. *Potts v. State,* 500 S.W.2d 523, 526-27 (Tex. Crim. App. 1973). Whether or not the consent was voluntarily given is a question of fact. *Swink v. State,* 617 S.W.2d 203, 210 (Tex. Crim. App. 1981). Thus the totality of the circumstances must be considered to determine whether appellant's consent to search was voluntary. *Paulus v. State,* 633 S.W.2d 827 (Tex. Crim. App. 1981).

We are of the opinion that the record in this case clearly reflects that appellant's consent to search was voluntarily given. Appellant himself testified that he read the consent-to-search form, that he knew what he was signing, and that when he signed the form he was neither forced nor threatened, but rather signed the form willingly. Appellant's own brief states that he was "agreeable" to signing the form. Appellant's consent removed the taint of an illegal arrest, if any, and vitiated the need for a showing of probable cause. Furthermore, facts and circumstances surrounding appellant's arrest and his signing of the consent-to-search form are clearly distinguishable from the facts of the cases cited by appellant wherein confessions were deemed inadmissable. *Brown v. Illinois,* 422 U.S. 590 (1974) (confession given after fourteen hours of interrogation); *Green v. State,* 615 S.W.2d 700, 708-

09 (Tex. Crim. App. 1981) (confession after interrogation and appellant's parents denied access). Here there is no evidence of improper conduct or intimidation, for a reading of the record discloses that appellant voluntarily consented to the search of his residence. Since the evidence is sufficient to justify the trial court's finding of voluntary consent, and since no evidence has been introduced to show that appellant's consent was involuntary or coerced in some way, the trial court's overruling of appellant's motion to suppress was proper. *Cf. Gant v. State,* 649 S.W.2d 30 (Tex. Crim. App. 1983); *Dowdy v. State,* 534 S.W.2d 336 (Tex. Crim. App. 1976). Based on the foregoing, appellant's three grounds of error are overruled.

The judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Associate Justice

Judgment Rendered and Opinion filed December 26, 1985.

Panel consists of Associate Justices Pressler, Murphy and Draughn.

No Publication — TEX. CR. APP. R. 207.

APPENDIX B

Donald Ray BRICK, Appellant,

v.

The STATE of Texas, Appellee.

No. 207-86.

Court of Criminal Appeals of Texas,
En Banc.

Oct. 21, 1987.

Defendant was convicted in 262nd Judicial District Court, Harris County, Doug Shaver, J., of second-degree felony of possession of marihuana. The Court of Appeals affirmed the conviction. Defendant petitioned for discretionary review. The Court of Criminal Appeals, Clinton, J., held that evidence derived from warrantless but consensual search was admissible if consent was voluntarily given and taint from any illegal arrest had dissipated.

Reversed and remanded.

White, J., concurred in result.

Ken J. McLean, Houston, for appellant.

John B. Holmes, Jr., Dist. Atty., & Calvin A. Hartmann, Lyn McClellan & Jaime Esparza, Asst. Dist. Attys., Houston, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

CLINTON, Judge.

Following his plea of guilty before the court appellant was convicted of the second degree felony offense of possession of marihuana in a quantity of 50 pounds or less but more than 5 pounds. Article 4476-15, § 4.051 (b)(4), V.A.C.S. His punishment was assessed at ten years, probated, and a fine of $5,000.00. Along the way the trial court overruled appellant's motion to suppress the marihuana, which appellant contended was discovered as a result of his illegal arrest and the subsequent warrantless search of his house.

On appeal to the Fourteenth Court of Appeals appellant argued that the arresting officers lacked probable cause either to arrest him or to search his house, that his arrest was unlawful in that it failed to meet any of the exceptions to warrantless arrest enumerated in Chapter 14, V.A.C.C.P., and that any consent to the warrantless search of his house was obtained through an exploitation of his illegal arrest, and hence inadmissible under Article 38.23, V.A.C.C.P. The court of appeals affirmed the conviction in an unpublished opinion. *Brick v. State,* No. B14-84-871CR (Tex. App.—Houston [14th], delivered December 26, 1985). Finding simply that the consent which had given rise to the warrantless search of his house had been given "voluntarily" by appellant following his arrest, the court of appeals declined to address the legality of that arrest, either from the standpoint of whether the arresting officers had probable cause to effect it, or of whether they reasonably believed appellant was "about to escape," Article 14.04, V.A.C.C.P., such that an arrest

warrant was not required. In his petition for discretionary review appellant assails the failure of the court of appeals to address the legality of his arrest, contending that the arrest was in fact unlawful, and that this initial illegality fatally tainted his consent to search the house. We granted appellant's petition to examine this contention. Tex. R. App. Pro., Rule 200(c)(3) and (6).

I.

The facts of the case, viewed in the light most favorable to the trial court's disposition of the motion to suppress, are fairly straightforward. Sometime during or prior to the evening of May 7th, 1984, Officer W.L. Kendrick of the narcotics division of the Houston Police Department received information from a confidential informant that the residents of 9619 Orangevale—appellant and two roommates whose names the informant did not know—were harboring "some cocaine" in their home. The informant, who had supplied correct information on two prior occasions, described the exterior composition of the house and its interior layout, and predicted that a maroon Corvette bearing a certain license plate number would be found there. This car, he said, belonged to appellant. At about 7:00 p.m. Kendrick and Officers Duke and Eslab proceeded to the address given and found a house matching the informant's exterior description and a maroon Corvette bearing the foretold license plate number. The car was found to be registered in appellant's name. On the basis of this corroboration Kendrick returned to the station "to type the search warrant."

Between 8:00 and 9:00 p.m. the informant again contacted Kendrick and told him appellant "was going to leave the residence and probably not return for a day or

two." Shortly thereafter Eslab and Duke, maintaining surveillance on the house, informed Kendrick that a person "believed to be" appellant was getting into the Corvette with a woman. Kendrick had "finished the warrant" by this time, but had not heard from the District Attroney's office as to what judge was on call to sign it. He advised Eslab and Duke to arrest appellant.

Eslab and Duke followed appellant and his companion to a nearby convenience store and arrested them both as they came out. Appellant was immediately handcuffed, after which Duke informed him that the officers "were in the process of having a narcotics warrant drawn up for his residence." Appellant indicated "he would cooperate in any way[,]" and he agreed to sign a consent form.[1] Still waiting for the District Attorney's office to call, Kendrick was notified of this turn of events. Consequently he "disregarded the search warrant" and drove out to the convenience store. Upon Kendrick's arrival, appellant was given a consent form which he read and indicated he understood. He was then uncuffed long enough to sign and date it.[2] Subsequently appellant's house was searched. Approximately ten pounds of marihuana, three and a half

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1. Appellant testified he was willing to cooperate with the officers because they told him they were looking for "quantities of cocaine." After he admitted he had marihuana and a small amount of cocaine in the house, the officers told him they would "overlook" these. Appellant maintained that with this understanding he consented to the search. Kendrick, who was not yet on the scene, testified that he never offered to overlook anything. Duke, who also testified at the pretrial hearing on the motion to suppress, was not questioned as to this alleged understanding. At any rate, appellant ultimately conceded the voluntariness of his consent. See *post*.

2. The consent form does not appear in the appellate record as it comes to this Court.

grams of cocaine and $26,000.00 in cash were found in his bedroom.

At the pretrial hearing on the motion to suppress appellant virtually conceded that consent was given voluntarily. During the prosecutor's redirect examination of Kendrick, defense counsel interjected:

> ". . . [the consent form] was voluntarily signed by [appellant]. My dispute will be with the legality of the arrest."

True to his word, counsel argued in his summation to the trial court:

> ". . . I'm certainly aware that consent obtained by police officers to search a residence is not involuntary, because there is conversation regarding that if you don't sign the consent, we can get a search warrant, anyway, and would cite the Court that authority. However, I don't think it's the issue in the case."

Having thus again practically admitted that appellant's consent was voluntary, counsel proceeded to argue that irrespective of the voluntariness of the consent, it was nevertheless tainted because "secured through the exploitation of an illegal arrest[.]" Appellant took the same tack on appeal, asserting in his brief that "[t]he consent was obtained through the exploitation of appellant's unlawful and illegal arrest and, therefore, cannot be used as a basis to uphold the search." In making this argument appellant relied by analogy upon, *inter alia, Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) and *Taylor v. Alabama,* 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982), in which apparently voluntary con-

fessions following illegal arrests were held inadmissible as fruit of the poisonous tree.

The court of appeals focused almost exclusively, however, on the question whether appellant's consent to search was voluntary. Noting that the fact of arrest alone will not operate to vitiate voluntariness of consent, the court of appeals concluded that under the totality of the circumstances, voluntariness was shown. Only passing reference was made to appellant's contention, *viz*: "Appellant's consent removed the taint of an illegal arrest, if any, and vitiated the need for a showing of probable cause." In giving such short shrift to the essence of appellant's complaint, the court of appeals erred.

II.

In *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) the Supreme Court opined:

> ". . . We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

371 U.S. at 488, 83 S.Ct. at 417, 9 L.Ed.2d at 455. The first occasion this Court had to apply the attenuation of taint analysis in the context of consent following an illegal arrest came in *Potts v. States,* 500 S.W.2d 523 (Tex. Cr. App. 1973). There it was held that "even assuming that

the arrest and detention were illegal, [defendant's] consent to search, voluntarily made, 'dissipated the taint of the arrest' and made the fruits of the search admissible into evidence. *Phelper v. Decker,* [401 F.2d 232 (CA5 1968)]." 500 S.W.2d at 526-27. It will be observed that the analysis in *Potts,* supra, sounds very like that which the court of appeals made in the instant cause. Subsequent caselaw, however, has rendered such a simple analysis untenable.

To begin with, *Phelper v. Decker,* supra, did not hold that voluntariness of consent following an illegal arrest would automatically attenuate the taint of the illegality and thus render admissible the fruit of the consensual search in every case. Though predating *Brown v. Illinois,* supra, by some seven years, *Phelper* recognized circumstances to be considered in determining whether taint has been attenuated which sound much like those later set out in *Brown.* One consideration was said to be "the proximity of the illegal arrest to the procurement" of the evidence sought to be suppressed. 401 F.2d at 237. Another was said to be "intervening occurrences between the illegal arrest and the acquisition of the evidence sought to be used." *Id.* The "most important" consideration was deemed to be "whether the arrest was illegal as a matter of failure to comply with technical requirements or whether the arrest and subsequent search and seizure amounted to a gross violation of legal processes." *Id.,* at 237-38. "Taking all these factors into consideration, *along with* the State Trial Judge's and jury's finding that Phelper's consent was voluntary and the product of his own free will,"[3] the Fifth Circuit concluded that the consensual search was not tainted. *Id.,* at 238. Later Fifth Circuit

3. All emphasis supplied unless otherwise indicated.

decisions applying *Phelper,* however, were to find dissipation of taint when consent to search after an arguably illegal arrest was voluntary, given in uncoercive circumstances, and following recitation of the defendant's *Miranda* warnings.[4] See *Bretti v. Wainwright,* 439 F.2d 1042, 1046 (CA5 1971); *United States v. Fike,* 449 F.2d 191, 194 (CA5 1972).

[1] However, in *Brown v. Illinois,* supra, decided in 1975, the Supreme Court held that the giving of *Miranda* warnings would not *per se* remove the taint of a confession which, though voluntarily given, followed on the heels of an unconstitutional arrest. *A fortiori,* such warnings can no longer be held necessarily sufficient in themselves to attenuate a tainted consent to conduct a warrantless search, as in *Bretti* and *Fike,* both supra, since they do not even address the suspect's right to refuse to *consent. Brown* delineated a set of considerations for determining attenuation of tainted confessions that is reminiscent of the *Phelper* Court's test for tainted consent. Rejecting, application of a "but/for" test, as had *Wong Sun,* supra, the Court instead observed:

> ". . . The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, [citation omitted], and, particularly, the purpose and flagrancy of the official misconduct are all relevant. [Citation omitted]. The voluntariness of the statement is a *threshold requirement.* [footnotes omitted.]"

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4. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

422 U.S. at 603-04, 95 S.Ct. at 2261-62, 45 L.Ed.2d at 427. A number of Fifth Circuit cases decided since *Brown v. Illinois,* supra, seem still to suggest that consent following illegal arrest will invariably be freed of taint so long as the consent was given voluntarily—although the government "will have a much heavier burden to carry than when the consent is given after a permissible stop." *United States v. Ballard,* 573 F.2d 913, 916 (CA5, 1978). See also *United States v. Troutman,* 590 F.2d 604, 606-07 (CA5 1979); *United States v. Ruigomez,* 702 F.2d 61, 65 (CA5 1983).[5] Other Fifth Circuit cases have applied the full panoply of factors found relevant in *Brown,* including but not limited to the question whether the consent given was voluntary under the totality of the circumstances, under *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) and *Bumper v. North Carolina,* 391 U.S. 543, 88 S.Ct. 1788,

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5. However, to say that legality *vel non* of an arrest should affect the weight of the State's burden as to voluntariness of any consent obtained thereafter seems anomalous. The degree of coerciveness involved in any given arrest is not a function of its legality. The State's burden would appear to be the same whether the arrest is legal or not; either way the State must show by clear and convincing evidence that the consent was voluntarily given and not the result of duress or coercion, express or implied, under the totality of the circumstances. E.g., *Dickey v. State,* 716 S.W.2d 499, 504 (Tex. Cr. App. 1986). What is this "heavier burden," and how can it be said to vindicate the purpose of the federal exclusionary rule and our own Article 38.23, V.A.C.C.P., to deter unlawful conduct on the part of law enforcement personnel and to close the doors of our courts to illegally obtained evidence? See *Brown v. Illinois,* supra. While once it is found voluntary, consent to search will certainly dispel the illegality of a subsequent warrantless *search,* the voluntariness determination alone does not fully account for the misfeasance of the police in having conducted an illegal *arrest* and thereby *obtaining* that consent. Thus, while a determination that consent was voluntary is a necessary component of a finding of attenuation of taint, it cannot be said, as did the court of appeals here, that it ends the analysis.

20 L.Ed.2d 797 (1968), in deciding dissipation of taint of a consent following illegal arrest. *United States v. Wilson,* 569 F.2d 392, 396-97 (CA5 1978); *United States v. Berry,* 670 F.2d 583, 604-05 (CA5 1982); *United States v. Cherry,* 759 F.2d 1196, 1210-12 (CA5 1985). Other Federal Circuits concur that a voluntariness determination does not end the inquiry. E.g., *United States v. Perez-Esparza,* 609 F.2d 1284, 1288-91 (CA9 1979); *United States v. Sanchez-Jaramillo,* 637 F.2d 1094, 1098-1100 (CA7 1980); *United States v. Gooding,* 695 F.2d 78, 84 (CA4 1982); *United States v. Thompson,* 712 F.2d 1356, 1361-62 (CA11 1983). The Supreme Court seems tacitly to have adopted this approach. *Florida v. Royer,* 460 U.S. 491, 501, 507-08, 103 S.Ct. 1319, 1326, 1329, 75 L.Ed.2d 229, 239, 243 (1983); cf. *United States v. Watson,* 423 U.S. 411, 414, 96 S.Ct. 820, 823, 46 L.Ed.2d 598, 603 (1976).

In his treatise on the Fourth Amendment Professor LaFave has observed:

> ". . . While there is sufficient overlap of the voluntariness and fruits tests that often a proper result may be reached by using either one independently, it is extremely important to understand that (i) the two tests are not identical, and (ii) consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was *both* voluntary and not an exploitation of the prior illegality."[6]

3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (2d ed. 1987), § 8.2(d) at 190.

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6. Emphasis in the original.

In cases decided since *Potts v. State,* supra, this Court has recognized that a determination of voluntariness does not necessarily dispose of the question of admissibility of evidence obtained from a consensual search following an illegal arrest or detention. Albeit without previously spelling out with any particularity what other factors are worthy of consideration in deciding whether the taint of an illegally obtained consent to search has been attenuated, we have at least observed on a number of occasions that, e.g., "[t]he detention, if unlawful, may also have tainted appellant's apparent voluntary consent to search the trunk." *Luera v. State,* 561 S.W.2d 497, 498 (Tex. Cr. App. 1978). See also *McDougald v. State,* 547 S.W. 2d 40, 42 (Tex. Cr. App. 1977); *Armstrong v. State,* 550 S.W.2d 25, 32 (Tex. Cr. App. 1978) (Opinion on State's motion for rehearing); *Meeks v. State,* 692 S.W.2d 504, 509 (Tex. Cr. App. 1985); *Dickey v. State,* 716 S.W.2d 499 (Tex. Cr. App. 1986); *Daniels v. State,* 718 S.W.2d 702 (Tex. Cr. App. 1986).[7]

[2] While this Court has not heretofore provided specific guidelines for measuring attenuation of a tainted

7. In *Daniels v. State,* supra, the defendant was detained at the Houston Intercontinental Airport by a Houston police officer who immediately obtained permission to inspect the contents of his luggage. Having found the detention illegal, we did not reach the question of voluntariness of the consent "because the consent, valid or not, was the result of the illegal stop and thus fatally tainted by the illegality of the stop." *Id.,* at 707. This holding should not be interpreted to mean that any consent obtained following an illegal detention or arrest will be deemed inadmissible *per se.* Such a holding would be as obnoxious as the notion that voluntariness of consent automatically vitiates the taint of the illegal arrest which made it possible. Rather, we simply determined on the facts of *Daniels* that the defendant's permission to search, given upon specific request and immediately following a stop which was not even justified by a reasonable suspicion, was fatally tainted irrespective of whether it was voluntary. Compare *Florida v. Royer,* supra.

consent to search, LaFave suggests a number of factors to be considered which are even more detailed than those enumerated in *Brown v. Illinois,* supra, for tainted confessions:

> ". . . In determining whether the consent was, as the Court put in *Brown,* 'obtained by exploitation of an illegal arrest,' account must be taken of the proximity of the consent to the arrest, whether the seizure brought about police observation of the particular object which they sought consent to search, whether the illegal seizure was 'flagrant police misconduct,' whether the consent was volunteered rather than requested by the detaining officers, whether the arrestee was made fully aware of the fact that he could decline to consent and thus prevent an immediate search of the car or residence, and whether the police purpose underlying the illegality was to obtain the consent."

LaFave, supra, at 193-94. We now hold that before it can be determined that evidence derived from a warrantless but consensual search following an illegal arrest is admissible, it must first be found, by clear and convincing evidence, not only that the consent was voluntarily rendered, but also that due consideration of the additional factors listed above militates in favor of the conclusion that the taint otherwise inherent in the illegality of the arrest has dissipated. The burden, of course, is on the State.

III.

Because the court of appeals declined to reach the question whether appellant's arrest was legal, let alone whether the taint of any illegality had dissipated by the time ap-

pellant consented to the search of his house, we remand the cause to that court for its reconsideration. That court may conclude that, even assuming the arrest was illegal, taint was attenuated under the circumstances, and thus avoid deciding whether the arrest was in fact unlawful. However, it may be important to its taint analysis for the court to determine in what way the arrest was illegal, if it was. Appellant contends the officers lacked probable cause. If that is correct, the arrest was a violation of appellant's constitutional rights under both federal and state constitutions. Because there were no grounds for the officers to believe he was about to escape, appellant further contends, his warrantless arrest was also perpetrated in violation of Article 14.04, supra. Though this latter illegality would stem from a violation of statute rather than constitution, in either event a taint analysis would be required. *Bell v. State,* 724 S.W.2d 780, 787 (Tex. Cr. App. 1986); *Self v. State,* 709 S.W.2d 662, 665 (Tex. Cr. App. 1986). But if the illegality, if any, rests alone upon the violation of the statute, this may well influence the court of appeals' assessment of the purposefulness and flagrancy of the police conduct, and, all other factors weighing equally, could ultimately tip the balance. See *Self v. State,* supra, at 667-68.

The judgment of the court of appeals is reversed and the cause is remanded for further proceedings consistent with this opinion.

WHITE, J., concurs in the result.

APPENDIX C

Affirmed and Opinion filed August 31, 1989.

IN THE
FOURTEENTH COURT OF APPEALS

NO. B14-84-00871-CR

DONALD RAY BRICK, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 403,065

OPINION ON REMAND

This is an appeal from the denial of a motion to suppress controlled substances seized pursuant to a consent search. Donald Ray Brick pled guilty to the court to the felony offense of possession of a quantity of marihuana weighing more than five but less than fifty pounds. TEX. REV. CIV. STAT. ANN. art. 4476-15 § 4.051(b)(4) (Vernon Supp. 1989). On original submission, we overruled appellant's three grounds of error in an unpublished opinion. *Brick v. State,* No. B14-84-871-CR (Tex. App. —Houston [14th Dist.], delivered Dec. 26, 1985). In response to a petition for discretionary review filed by

the appellant, the court of criminal appeals remanded his cause to this court for further review. *Brick v. State,* 738 S.W.2d 676, 678 & n.5 (Tex. Crim. App. 1987).

The record on original submission of this case did not contain a copy of the consent form by which appellant authorized the arresting officers to search his residence. *Brick,* 738 S.W.2d at 677 n.2. Relying on TEX. R. APP. P. 51(d), we concluded inspection of the original of the form was necessary to our disposition of appellant's case and on July 20, 1989, we ordered the district clerk of Harris County to deliver the original of that document, State's Exhibit One, to this court. Having received that exhibit and having conducted the analysis mandated by the court of criminal appeals, we affirm.

Houston Police Narcotics Officer W.L. Kendrick received information from a confidential informant sometime during or prior to the evening of May 7, 1984. The informant, who had supplied correct information at least twice before, told Kendrick that appellant and two other unnamed males had "some cocaine" in the residence located at 9619 Orangevale in Harris County. The informant described the appellant and said he owned a maroon Corvette bearing a certain license plate, which the officers could find at the address. The informant also described the exterior of the house and its interior layout, including the location of the closet in appellant's bedroom where the police later found approximately ten pounds of marihuana and $25,000. That same evening, at about 7 p.m., Kendrick and fellow narcotics officers Duke and Eslab drove to the Orangevale address. The house and the Corvette and its license place corresponded to the informant's description. When a computer check showed

that the car was registered in appellant's name, Kendrick returned to the police station to prepare a search warrant and left Eslab and Duke to continue surveillance outside the residence.

Kendrick was working on the search warrant when he received a second telephone call from the informant between 8:00 and 9:00 p.m. The informant told Kendrick the appellant "was going to leave the residence and probably not return for a day or two." Shortly thereafter, Officers Eslab and Duke radioed Kendrick to tell him a woman and a person "believed to be" the appellant were getting into the Corvette. Kendrick had completed preparing the warrant by then, but the District Attorney's office had not yet directed him to a magistrate. Kendrick told Eslab and Duke to stop and arrest appellant because "the suspect was feared not to return to the house."

Eslab and Duke followed the car to a convenience store. After identifying themselves, the officers arrested appellant and his companion as they left the store where they had purchased two six-packs of soda. During the hearing on appellant's motion to suppress, appellant testified that Officer Duke told him the police "were in the process of having a narcotics warrant drawn up for his residence." Officer Duke testified the appellant indicated "he would cooperate in any way" and agreed to sign the consent form. Duke and Eslab then contacted Kendrick, who had been unable to reach the District Attorney's office and was still waiting for that office to telephone him. On hearing that appellant had consented to the search, Kendirck "disregarded his search warrant" and joined Eslab and Duke at the scene. When Kendrick arrived, the officers gave appellant a consent form which he read and

indicated he understood. The officers temporarily removed his handcuffs and appellant signed and dated the form, noted the time and initialled the time notation, 9:35 p.m.

At the hearing on the motion to suppress, appellant claimed he was willing to cooperate because the officers told him they were looking for "quantities of cocaine" and purportedly agreed to overlook "some" marihuana and a small amount of cocaine, which he admitted having in the house, because they "were not looking for that." When questioned about his actions on arriving at the scene, Officer Kendrick denied telling appellant he would overlook anything in the house. He also denied telling appellant he wasn't "really looking for the marihuana." Neither appellant nor the State questioned Officer Duke about the alleged "agreement."

Following execution of the consent form and arrival of additional county police, the officers went to appellant's house and searched it. They found three pounds of marihuana in the bedroom closet the informant had described and found a combination safe in the same closet, as the informant said they would. They also found a foot locker containing seven pounds of marihuana in another closet in the same room and approximately three and one half grams of cocaine in appellant's desk. The officers removed $25,000 from the safe after appellant opened it.

Appellant filed a pre-trial motion to suppress the marihuana and cash seized from his residence. The trial court denied the motion, found appellant guilty on the evidence and his plea and sentenced him to a probated sentence of ten years in the Texas Department of Corrections and a $5,000 fine.

On original submission with this court, appellant challenged the denial of his motion to suppress on the grounds that the arresting officers lacked probable cause to search and that the arrest was illegal, which therefore tainted the evidence seized, notwithstanding appellant's having consented to the search. We overruled appellant's contentions and affirmed his conviction in an unpublished opinion.

On appellant's petition for discretionary review, the court of criminal appeals recognized appellant's having "virtually conceded" his free and voluntary consent to the warrantless search, *Brick,* 738 S.W.2d at 677, but held that we erred by focusing primarily on that issue because a showing of voluntariness, even clear and convincing evidence of voluntariness, will not alone validate a warrantless, but consensual search. 738 S.W.2d at 681. *See Brown,* 422 U.S. at 604 (voluntariness is a "threshold requirement"). The court of criminal appeals held the State must show clear and convincing evidence of a voluntary consent *and* clear and convincing evidence that "the taint otherwise inherent in [an illegal] arrest has dissipated" before evidence derived from a warrantless consent search will be admissible. *Brick,* 738 S.W.2d at 681. Reiterating these principles in *Juarez v. State,* 758 S.W.2d 772 (Tex. Crim. App. 1988), the court stated that voluntary consent is "but one step" in determining whether a search was proper, 758 S.W.2d at 778, and that there must *also* be a determination whether the consent was the product of an illegal arrest or detention, and therefore tainted, or obtained by " 'means sufficiently distinguishable to be purged of the primary taint.' " *Id.,* quoting from *Brown v. Illinois,* 422 U.S. at 599; *accord, Reyes v. State,* 741 S.W.2d 414, 431 (Tex. Crim. App.

1987) ("better view" is that evidence seized based on a purported consent which follows an illegal arrest will not be admissible unless "the consent is both voluntary and not an exploitation of the prior illegality."

Both appellant and the State have filed briefs with this court following remand by the court of criminal appeals. The State's principal contention is that a taint analysis is unnecessary because appellant's arrest was legal and valid. Appellant argues his illegal arrest tainted his consent and alternatively, that he simply acquiesced to the officers' claim of lawful authority.

The *Brick* court instructed us to evaluate whether any taint had dissipated by giving due consideration to the four factors governing challenges to the voluntariness of a confession enunciated in *Brown v. Illinois,* 422 U.S. 590, 601-03 (1975) and the three additional factors recommended in 3 W. LaFave, Search & Seizure, A Treatise on the Fourth Amendment § 8.2(d) at 193-94 (2d ed. 1987) [hereinafter "LaFave"].[1] The *Brown* factors include: 1) whether the accused received a *Miranda* warning; 2) the temporal proximity of the arrest to the consent to search; 3) the presence of intervening circumstances; 4) the purpose and flagrancy of the official misconduct. *Brick,* 738 S.W.2d at 679, quoting from *Brown,* 422 U.S. at 603-04. The "LaFave" factors add to the four *Brown* factors "whether the consent was volunteered rather than requested by the detaining officers, whether the arrestee was made fully aware of the fact that he could decline to consent and thus prevent an

1. The *Juarez* court did not require analysis by the "LaFave" factors and indicated the *Brown* factors are not "absolutely controlling . . . guidelines." *Juarez,* 758 S.W.2d at 780.

immediate search of the car or residence,[2] and whether the police purpose underlying the illegality was to obtain the consent." 2 LaFave § 8.2(d) at 193-94.

Although the court indicated we need not decide whether appellant's arrest was unlawful, 738 S.W.2d at 681, it also indicated that illegality in the arrest might be important in evaluating the taint issue, particularly in view of appellant's contention that the arrest was unlawful under Tex. Code Crim. Proc. Ann. art. 14.04 (Vernon 1977). 738 S.W.2d at 681. Therefore, as a preliminary matter, we will address the legality of the arrest for purposes of our taint analysis.

An arrest obtained without a warrant is inherently unreasonable as a general rule. *Beasley v. State,* 728 S.W.2d 353, 355 (Tex. Crim. App. 1987). Although a case-by-case assessment determines probable cause to support a warrantless arrest under the federal constitution, *e.g., Pyles v. State,* 755 S.W.2d 98, 109 (Tex. Crim. App.), *cert. denied,* 109 S.Ct. 543 (1988), Texas law requires the State to satisfy one of the exceptions in the Code of Criminal Procedure when police fail to obtain a warrant to arrest the accused. *Id.; DeJarnette v. State,* 732 S.W. 2d 346, 349 (Tex. Crim. App. 1987).

Appellant maintains the circumstances of his arrest violate Tex. Code Crim. Proc. Ann. art. 14.04 (Vernon 1977) which governs "Arrests when Felony Has Been Committed." Article 14.04 states:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person,

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2. The *Juarez* court noted that a police officer need *not* inform the accused that he has a right to withhold his consent. 758 S.W.2d at 781 n.5.

> that a felony has been committed, *and* that the offender is *about to escape*, so that there is not time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused (emphasis added).

Article 14.04 safeguards against unreasonable seizure of the person and facilitates apprehension of suspects who would escape pending procurement of a warrant. *See DeJarnette*, 732 S.W.2d at 350.

For Article 14.04 to justify appellant's warrantless arrest, the State had to show the officers had "satisfactory proof" that: 1) a felony had been committed; 2) the appellant was the offender; and 3) the appellant was "about to escape." *DeJarnette*, 732 S.W.2d at 349; *accord, Sklar v. State*, 764 S.W.2d 778, 780 (Tex. Crim. App. 1987) (citing same).[3]

Evaluating compliance with the "about to escape" exception in Article 14.04 has proved difficult for Texas courts. *See Stanton v. State*, 743 S.W.2d 233 (Tex. Crim. App. 1988) (McCormick, J., concurring). At a minimum however, the facts of the particular case, *i.e.*, the "concrete factual situation spread on the record," must justify an Article 14.04 arrest. *Stanton*, 743 S.W.2d at 235, quoting

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3. In *Brooks v. State*, 707 S.W.2d 703, 705 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd), our sister court held that the showing required by Article 14.04 is the *equivalent* of "constitutional probable cause." *Contra, Stanton v. State*, 743 S.W.2d 233, 237 (Tex. Crim. App. 1988) (McCormick, J., concurring). To meet constitutional muster, the facts of each case must show that at the moment of arrest, the facts and circumstances which are within the knowledge of the arresting officer, and of which he has reasonably trustworthy information, would warrant a reasonable person's believing the accused has committed or is committing a crime. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *E.g., Pyles*, 755 S.W.2d at 109; *Brown v. State*, 481 S.W.2d 106, 110 (Tex. Crim. App. 1972).

King v. State, 631 S.W.2d 486, 497 (Tex. Crim. App.) (en banc), *cert. denied,* 459 U.S. 928 (1982); *DeJarnette,* 732 S.W.2d at 352. As a general rule, "satisfactory proof" can arise from the arresting officer's personal observations or information the officers receive from a credible person, *Stanton,* 743 S.W.2d at 235, and the State need not show that the accused was "actually escaping." *West v. State,* 720 S.W.2d 511, 514 (Tex. Crim. App. 1986), *cert. denied,* 107 S.Ct. 2470 (1987); *cf., DeJarnette,* 732 S.W.2d at 349; *Fry v. State,* 639 S.W.2d 463, 476 (Tex. Crim. App. 1982) (opinion on State's motion for rehearing, en banc), *cert. denied,* 460 U.S. 1039 (1983) (State need not "in fact" prove that offender was about to escape or that there was not time to obtain a warrant). Furthermore, satisfactory proof need not convince the arresting officer beyond a reasonable doubt that the accused would escape. *DeJarnette,* 732 S.W.2d at 349. Proof is "satisfactory" if it leads the arresting officers to reasonably believe the offender "would take flight if given the opportunity to do so," *Stanton,* 743 S.W.2d at 236, quoting *West,* 720 S.W.2d at 518, so that there is no time to procure a warrant. *Fry,* 639 S.W.2d at 476.

Through the information supplied by the confidential informant and their own investigation, Officers Eslab and Duke could reasonably believe appellant had committed a felony; they therefore had sufficient proof to satisfy the first two prongs of Article 14.04. But Officer Kendrick's informing the arresting officers that appellant would "probably" not return for a day or two may or may not have been sufficient additional information to satisfy the "about to escape" prong of the statute, particularly when there was little within the officers' perception to suggest

that appellant would take flight if given the opportunity.[4] *See Stanton,* 743 S.W.2d at 236. *See also, Id.,* ("[t]he mere fact of driving away from one's own house . . . , without more, is not sufficient to show escape" under Article 14.04). For these reasons, and since a warrantless arrest is presumptively unreasonable, *Beasley,* 728 S.W.2d at 355, we will assume, without deciding, that the arrest of appellant did not satisfy Article 14.04 so that the analysis mandated by the court of criminal appeals be complete. *See Brick,* 738 S.W.2d at 681.

The first of the *Brown* factors is whether appellant received a *Miranda* warning. *E.g., Brick,* 738 S.W.2d at 679. We have applied this factor to the circumstances of appellant's case and find that it weighs in his favor. The record shows that appellant knew he was talking to police officers, who were wearing narcotics raid jackets and identified themselves as police officers and showed their badges, but neither the State nor the appellant elicited testimony showing that Officers Eslab and Duke read appellant his legal warning before arresting him. Whether or not appellant received his *Miranda* is not a determinative factor however. *Brick,* 738 S.W.2d at 679; *Juarez,* 758 S.W.2d at 781. And it is not an overly strong factor in this case: the record is merely silent concerning the warning; it does not suggest that the officers failed to warn appellant of his constitutional and statutory rights.

The time factor is ordinarily the "least determinative" of the *Brown* factors since what takes place in the interval

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4. Appellant testified he was barefoot, was wearing jeans and a tee shirt, had left the house only to buy the soda and intended to return to the house immediately. Officer Duke claimed the appellant was wearing shoes, but conceded he saw no luggage in view. He also conceded arresting appellant based on Kendrick's direction. The arrest was therefore not based on what the officers observed.

between the arrest or stop and the search is a much more significant factor than whether the defendant consents immediately after the detention or five days later. *Juarez,* 758 S.W.2d at 781, 782. In this case the record shows that appellant agreed to sign a consent-to-search form very soon after 9 p.m., when Officers Eslab and Duke arrested him. But his own notation shows that he did not sign the form until 9:35 p.m., which was after Officer Kendrick arrived at the scene. Approximately another hour passed before the police who would assist with the search arrived at the scene. But the time interval factor at least shows that appellant had approximately a half hour to consider whether to sign the consent form and approximately another hour to withdraw his consent, although these considerations are minimal without the remaining *Brown* factors. *Juarez,* 758 S.W.2d at 782.

One significant intervening factor in appellant's case is his having executed a written consent to the search. Although consent is no longer controlling, *e.g., Brick,* 738 S.W.2d at 681, the court of criminal appeals reaffirmed the often quoted maxim of *Shneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973) in its *Juarez* opinion: clear and convincing evidence of a free and voluntary consent can remove any taint from the evidence seized, whether the taint results from an illegal arrest, lack of probable cause to search, or failure to obtain a search warrant. *Juarez,* 758 S.W.2d at 776.

As the court of criminal appeals noted in its opinion in appellant's case, he virtually conceded having freely and voluntarily consented to the search. *Brick,* 738 S.W. 2d at 677. On examining the language in the consent form appellant signed we find significant additional factors

which favor the State. The document by which appellant authorized the search also informed him that he had a constitutional right to require a search warrant *and* a right to refuse to consent. Appellant nonetheless signed the form, which further recites: "This written permission is being given . . . voluntarily *and without threats or promises of any kind* and is given with my full and free consent." Appellant's acknowledging these rights on the consent form weighs significantly in favor of the State.

The presence and purpose of police misconduct is the last and most significant of the *Brown* factors. 422 U.S. at 604. But beyond the illegality in the arrest which we have assumed for purposes of analysis, there is little in the record to suggest overreaching by the police, either in their initial arrest of the appellant or their obtaining his consent.

With respect to the arrest, Officer Kendrick had prepared the search warrant, for which he had ample probable cause based on the information received from the informant and his own investigation, and was waiting to present it to a magistrate when the informant communicated his fear that appellant would leave town for a few days. Officer Duke candidly admitted he arrested appellant based on Kendrick's communicating that fear to him. This was not a subterfuge stop and arrest for a purported traffic investigation. Appellant testified Officer Duke's "exact words" were "You [are] under arrest for narcotics investigation" and Duke testified that when he told appellant the police were "in the process of having a narcotics warrant drawn up for his residence," appellant said "he would cooperate in any way." Appellant also stated "he would" when asked if he would sign a consent-to-search

form. These were the circumstances under which Kendrick abandoned pursuing the search warrant and proceeded to the scene.

Appellant testified he was cooperative and answered "No" when asked if the officers hit him or drew their guns. He also agreed that the officers had "[n]ot really force[d] him to sign the consent form. Beyond the illegality of the warrantless arrest which we have assumed for purposes of analysis, the following excerpt from the statement of facts of the suppression hearing is the only other suggestion of "misconduct" by the police in this case. It is an exchange between the prosecutor and appellant concerning the circumstances surrounding his signing the consent form.

> PROSECUTOR: Did the police officers ever force you to sign it?
>
> APPELLANT: Not really force me.
>
> PROSECUTOR: Well, they didn't threaten you; did they?
>
> APPELLANT: Not exactly.
>
> PROSECUTOR: Would it be fair to say that you signed that because you were trying to be cooperative with the police officers?
>
> APPELLANT: Yes.
>
> PROSECUTOR: And you really didn't have any objection to them [*sic*] searching your house?
>
> APPELLANT: Well, I did. And I told them what was in there. And he said, "That's fine; we're not looking for that." I say, "Okay." He says, "We'll overlook it." I said, "Okay; that's fine. We don't have any of that in there."

PROSECUTOR: What exactly were they—what did you tell them that you think that was in there that they would overlook?

APPELLANT: *Some marijuana.*

PROSECUTOR: That didn't matter to them?

APPELLANT: No.

PROSECUTOR: And at that time, you said, "Fine; I'll sign the consent to search"?

APPELLANT: More or less.

PROSECUTOR: Did you tell them that there was cocaine in the house?

APPELLANT: *Yes.*

PROSECUTOR: And did they also say, "That's fine; we're going to overlook that, too"?

APPELLANT: Yes.

PROSECUTOR: What were they looking for?

APPELLANT: *Quantities of cocaine.*

PROSECUTOR: Excuse me?

APPELLANT: *Quantities of cocaine.*

PROSECUTOR: But when you signed that consent to search, you knew what you were doing?

APPELLANT: I knew what they were telling me; and they said that that didn't matter—what I had in there; but they hear [*sic*] there was a lot of cocaine in there. And I said, *"Sir I don't; you can come look in my house."*

PROSECUTOR: Did they inform you that they were in the process of executing a search warrant?

APPELLANT: Yes.

PROSECUTOR: Well, actually they told you that they were in the process of writing a search warrant —right—that they were drawing one up?

APPELLANT: Something to that effect.

PROSECUTOR: Mr. Brick, I'm going to show you what's been marked as State's Exhibit 1. Can you tell me whether or not your signature appears at the bottom of State's Exhibit 1?

APPELLANT: Yes.

PROSECUTOR: Can you tell me what this is?

APPELLANT: It's a consent form.

PROSECUTOR: Is this the consent form that you signed on May 7th, 1984?

APPELLANT: Yes.

PROSECUTOR: *The one which you read?*

APPELLANT: It looks like it.

PROSECUTOR: Well, exactly, did you sign a consent-to-search form. In the back of the police car?

APPELLANT: In George's truck.

PROSECUTOR: George's truck? Who's George?

APPELLANT: One of the officers.

PROSECUTOR: You weren't handcuffed at the time; were you?

APPELLANT: Yes.

PROSECUTOR: They just gave you a pen and told you where to sign?

APPELLANT: And he finally unhandcuffed one of my hands, uh-huh.

PROSECUTOR: So he unhandcuffed you so you could sign it?

APPELLANT: Uh-huh.

PROSECUTOR: Where was your girlfriend?

APPELLANT: They were sitting in the car.

PROSECUTOR: In the police car?

APPELLANT: No; in my car, along with the other officer.

PROSECUTOR: When you signed the consent-to-search form, you did that willingly?

APPELLANT: *Yes.*

PROSECUTOR: You wanted to sign the consent-to-search form?

APPELLANT: No. (emphasis added)

Since appellant conceded he was aware the police were investigating narcotics violations, the essence of any assertion of misconduct or coercion by the arresting officers is appellant's testimony that they agreed to "overlook" the "some" marihuana and the "some" cocaine he admitted possessing because they were actually looking for "quantities" of cocaine. Yet the consent-to-search form, which appellant testified he read and signed "willingly," conflicts with these assertions: it indicates that he gave his consent without "threats or promises of any kind."

When this court reviews the trial court's rulings on a motion to suppress, we must give due respect to the trial court as the sole judge of the credibility of the witnesses and the weight to accord their testimony and are not at liberty to disturb rulings supported by the record. *E.g., Green v. State,* 615 S.W.2d 700, 707 (Tex. Crim. App.), *cert. denied,* 454 U.S. 952 (1981); *accord, Brick,* 738 S.W.2d at 677 (court of criminal appeals viewed the facts

of appellant's case "in the light most favorable to the trial court's disposition of the motion to suppress"). The consent form belies any purported agreement to overlook certain drugs. Moreover, the record shows that Officer Kendrick denied coercing the consent or obtaining it by subterfuge and that appellant elicited no testimony from Officer Duke about the alleged agreement. Appellant conceded he consented voluntarily and the remaining conduct of the arresting officers and the additional officers who searched appellant's residence was not coercive by appellant's admission. Since the record evidence would support findings that police did not coerce appellant's consent and did not otherwise overstep the bounds of proper police procedure, we may infer that the trial court made those implied findings when it overruled appellant's motion to suppress. The same evidence supports our conclusion that the "presence and purpose of police misconduct" factor weighs heavily in favor of the State in this case even if we assume that the arrest did not comply with Article 14.04.

Having applied the *Brown* factors, we turn to the three additional factors recommended by LAFAVE and adopted for purposes of our review in *Brick*, 738 S.W.2d at 681.[5] As the foregoing excerpt of appellant's testimony reflects, appellant did not "want" to consent and was therefore not a "volunteer." And although the officers initiated the request, appellant was cooperative. Turning to the second "LAFAVE" factor, whether police informed the suspect of his right to refuse consent, the consent form which appellant read, signed and understood clearly communicated that information. We further note that the *Juarez*

5. *See supra*, n.2.

court rejected the requirement that police inform the accused of his right to refuse a consent. *Juarez*, 758 S.W.2d at 781 n.5, citing *Shneckloth*.

As we have noted, the third "LaFave" factor requires us to determine whether the police purposely acted unlawfully in order to obtain the consent. Even if we assume that Officers Duke and Eslab arrested appellant without complying with Article 14.04, there is nothing in the record which suggests that they arrested him simply to obtain his consent. Moreover, Duke clearly informed appellant of the purpose of the detention and although Duke also informed appellant that a search warrant was in preparation, appellant voluntarily agreed to sign a consent form. The record is devoid of testimony suggesting that the arresting officers referred to the search warrant to coerce appellant's consent by suggesting that a search was inevitable. As we have noted, appellant attested to an "agreement" to overlook "some" marihuana. But, as we have also noted, the consent-to-search form contradicts this assertion and Officer Kendrick denied telling appellant he "[wasn't] really looking for the marihuana." Thus, the record does not suggest that the police purposely acted illegally in order to obtain appellant's consent.

After applying the *Brown* factors and the additional "LaFave" factors as instructed by the court of criminal appeals, we conclude: the State offered clear and convincing evidence that appellant freely and voluntarily consented to the search and that the taint of illegality in his initial arrest, if any, had dissipated when he signed the consent-to-search form. We further conclude that the record supports the trial court's implied finding that no coercion or purported "agreement" tainted the consent.

Since the record supports the trial court's ruling on the motion to suppress, we reject appellant's contentions and affirm the judgment of conviction.

/s/ Paul C. Murphy,
Justice

Judgment rendered and Opinion filed August 31, 1989.

Panel consists of Justices Pressler, Murphy and Draughn.

Do Not Publish. TEX. R. APP. P. 90.

APPENDIX D

Official Notice
Court of Criminal Appeals

February 7, 1990

COA#: 14-84-00871-CR

RE: Case No. 1375-89

STYLE: Brick, Donald Ray

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail to:

Ken J. McLean
1900 N. Loop West, Suite 500
Houston, TX 77018

Official Notice
Court of Criminal Appeals

February 7, 1990

COA#: 14-84-00871-CR

RE: Case No. 1375-89

STYLE: Brick, Donald Ray

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

JUDGE CLINTON WOULD GRANT.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail to:

Ken J. McLean
1900 N. Loop West, Suite 500
Houston, TX 77018

Official Notice
Court of Criminal Appeals

March 14, 1990

COA#: 14-84-00871-CR

RE: Case No. 1375-89

STYLE: Brick, Donald Ray

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail to:

Ken J. McLean
1900 N. Loop West, Suite 500
Houston, TX 77018

Official Notice
Court of Criminal Appeals

March 14, 1990

COA#: 14-84-00871-CR

RE: Case No. 1375-89

STYLE: Brick, Donald Ray

On this day the Appellant's motion for Rehearing was denied.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail to:

Ken J. McLean
1900 N. Loop West, Suite 500
Houston, TX 77018